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No. 02 -1304

In the
Supreme Court of the United States
October Term, 2002

ESPLANADE PROPERTIES, LLC,
Petitioner,
v.
CITY OF SEATTLE,
Respondent.

On Petition for Writ of *Certiorari* to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIÆ* NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Amicus Curiæ New England Legal Foundation ("NELF") adopts the questions presented by Petitioner Esplanade Properties, LLC ("Esplanade"). This brief *amicus curiæ* focuses on Esplanade's first two questions presented:

1. May a federal court impose upon the state a unique, restrictive version of the public trust doctrine that is incompatible with the state's own doctrine and with the decisions of this Court upon which the state's doctrine is premised?

2. Whether a federal court may modify a state's long established public trust doctrine and declare the doctrine a "background principle of the state's law of property" that allows local governments to preclude any economic use of private tidelands that interferes with public recreation without incurring an obligation to pay just compensation?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIÆ* 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. Federal courts need to protect property owners of former public trust properties and limited public trust properties from novel interpretations of the public trust that would retroactively eviscerate property owners' long-held expectations for productive use of their properties 4

A. The Court of Appeals erroneously limited the ability of states to alienate public trust property 6

B. The Court of Appeals erroneously determined that the existence of a public trust interest in state alienated property warranted the government's complete prohibition on use of the property 11

II. The Court of Appeals' use of federal public trust precedents demonstrates the extent of the federal issue in this case 13

CONCLUSION 17

CASES

Bell v. Town of Wells, 557 A.2d 168 (Me. 1989) 10

Boston Waterfront Dev. Corp. v. Commonwealth,
393 N.E.2d 356 (Mass. 1979) 9,14

Caminiti v. Boyle, 732 P.2d 989 (Wash. 1998) 6,7

Davidson v. State, 802 P.2d 1374 (Wash. 1991) 7

Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) 11,16

Eisenbach v. Hatfield, 26 P. 539 (Wash. 1891) 7,8

Esplanade Properties, LLC v. City of Seattle,
307 F.3d 978 (9th Cir. 2002), *cert. pending*,
No. 02-1304 (April 7, 2003, U.S.) 4,5,8,9,12

The Golden Rod, 197 F. 830 (D. Me. 1912),
aff'd, 208 F. 24 (1st Cir. 1913) 14

Greater Providence Chamber of Commerce v. State,
657 A.2d 1038 (R.I. 1995) 9,14

Harris v. Hylebos Indus., 505 P.2d 457
(Wash. 1973) 7,8,15

Home for Aged Women v. Commonwealth,
89 N.E. 124 (Mass. 1909) 14

Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892) 4,5,6,7

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 15

Lucas v. South Carolina CoastalCouncil,
505 U.S. 1003 (1992) 5,16

Manning v. New England Mut. Life,506 N.E.2d 870
(Mass. 1987) 9

New York, N.H. & H. R. Co. v. Armstrong,102 A. 791
(Conn. 1918) 10,14

Opinion of the Justices, 437 A.2d 597 (Me. 1981) 10,14

Opinion of the Justices, 424 N.E.2d 1092
(Mass. 1981) 9,14

Opinion of the Justices,424 N.E.2d 1111
(Mass. 1981) 9

Opinion of the Justices, 649 A.2d 604 (N.H. 1994) 10,14

Orion Corp. v. State,747 P.2d 1062 (Wash. 1987),
cert. denied, 486 U.S. 1022 (1988) 9,11,12,13

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) 14,16

Providence & Worcester R.R. v. Pine,729 A.2d 202
(R.I. 1999) 9,11

Puget Mill Co. v. State, 160 P. 310 (Wash. 1916) 7,8

Purdie v. Attorney General, 732 A.2d 442 (1999) 10

Rettkowski v. Department of Ecology,
858 P.2d 232 (1993) 8

Shively v. Bowlby, 152 U.S. 1 (1894) 13

State v. Central Vermont Ry.,571 A.2d 1128 (Vt. 1989) 10,14

State v. Sturtevant, 135 P. 1035 (1913) 7,8

Trio Algarvio, Inc. v. Department of Envtl. Protection, 778 N.E.2d 529, 531–32 (Mass. App. Ct. 2002), *review granted*, 782 N.E.2d 1083 (Mass. 2003) 9–10

Weden v. San Juan County,958 P.2d 273 (Wash. 1998) 6,8

CONSTITUTION AND STATUTES

U.S. CONST. amend. V 13,14

U.S. CONST. amend. XIV 14

Wash. Rev. Code § 47.12.020 8

Wash. Rev. Code § 79.01.020 7

RULES

SUP. CT. R. 10 (b) 16

SUP. CT. R. 10 (c).....16

MISCELLANEOUS

Lloyd R. Cohen, *The Public Trust Doctrine: An Economic Perspective*, 29 CAL. W. L. REV. 239 (1992) 11,13,15

James L. Huffman, *Trusting the Public Trust to Judges: A Comment on the Public Trust Writings of Professors Sax, Wilkinson, Dunning and Johnson*, 63 DENV. U. L. REV. 565 (1986) 11

James L. Huffman, *Avoiding the Takings Clause Through the Myth of Public Rights: The Public Trust and Reserved Rights Doctrines at Work*, 3 J. LAND USE & ENVTL. L. 171 (1987) 11

Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631 (1986) 11–12,13

Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) 15

Geoffrey R. Scott, *The Expanding Public Trust Doctrine: A Warning to Environmentalists and Policy Makers*, 10 FORDHAM ENVTL. L.J. 1 (1998) 12

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BRIEF OF *AMICUS CURIÆ* NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIÆ*[1]

Amicus seeks to bring to the Court's attention its views, and those of its supporters, concerning the effect of the public trust doctrine as a background principle of state law on the takings clause under the Fifth and Fourteenth Amendments to the United States Constitution.

Amicus Curiæ the New England Legal Foundation ("NELF") is a non-profit, public interest law firm,

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1 Pursuant to Supreme Court Rule 37.6, counsel for *amicus* states that counsel for neither Petitioner nor Respondent authored this brief in whole or in part and no person or entity other than *amicus* made a monetary contribution to the preparation or submission of the brief. Pursuant to Supreme Court Rule 37.2 (a), counsel for *Amicus* has secured written consent for the filing of this brief from counsel for Petitioner and Respondent.

incorporated in Massachusetts in 1977. It is headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth for New England, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations from all parts of New England and the United States. NELF's members are affected by the real estate development climate in New England, which depends, in part, upon the extent to which land-use agencies respect property owners' development expectations. Furthermore, some of NELF's members are directly interested in real estate development because they own, finance, develop, and manage real estate. For those reasons, NELF's members are concerned about the issues presented this case.

NELF has regularly appeared in state and federal courts, as party or counsel, in cases raising issues of general economic significance to the New England and national business communities. *See, e.g., Green Tree Fin. Corp. v. Bazzle, cert. granted,* 123 S. Ct. 817 (2003); *EEOC v. Waffle House, Inc.,* 534 U.S. 279 (2002); *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001); *Crosby v. National Foreign Trade Council,* 530 U.S. 363 (2000); *Estados Unidos Mexicanos v. DeCoster,* 229 F.3d 332 (1st Cir. 2000); *Bessette v. Avco Fin. Servs.,* 230 F.3d 439 (1st Cir. 2000), *cert. denied,* 532 U.S. 1048 (2001); *Greater Boston Real Estate Board v. Department of Telecomm. & Energy,* 438 Mass. 197, 779 N.E.2d 127 (2002); *Chandler v. County Commrs.,* 437 Mass. 430, 772 N.E.2d 578 (2002).

Amicus believes that private property and its protection are important building blocks of democracy. Private property helps distinguish individuals' interests from those of the state, and thus acts as a limit on state power. Requiring compensation for restraints on use and

enjoyment of private property caused by new and expansive interpretations of historical principles of state law such as the public trust doctrine will ensure that the burdens of achieving a socially desirable goal will be equitably allocated among all taxpayers and will ensure that the electorate makes informed decisions about policy choices and priorities.

Amicus Curiæ therefore believes that this brief may provide an additional perspective which may aid the Court in determining whether to grant the petition for a writ of *certiorari* of the petitioner, Esplanade Properties, LLC.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case contained in the Brief of the Petitioner, Esplanade Properties, LLC.

SUMMARY OF ARGUMENT

The issues raised by this case are of national importance because the Court of Appeals for the Ninth Circuit applied an overbroad interpretation of federal public trust precedents to eliminate property rights previously alienated by the state for development purposes. The decision below threatens riparian and littoral property owners nationwide who have relied on traditional interpretations of the public trust doctrine which allow states to alienate public trust property. Throughout the United States, states have alienated public trust property in order to enhance commerce and development or because the state deemed particular property non-essential to trust purposes. Thousands of property owners have purchased their property relying on historic alienations of public trust property by the states. Without federal protection for historically accurate interpretations of the public trust doctrine, the states will be free to renege on their promises to the public to

respect private rights in property that the states alienated freely and knowingly, and often for considerable compensation.

ARGUMENT

I. Federal courts need to protect property owners of former public trust properties and limited public trust properties from novel interpretations of the public trust that would retroactively eviscerate property owners' long-held expectations for productive use of their properties.

Amicus contends that the United States Court of Appeals for the Ninth Circuit erred in three principal regards. First, contrary to applicable state and federal precedents, the Appeals Court deemed the public trust unalienable, rendering all property ever subject to the public trust forever subject to interference by the government on public trust grounds. *See Esplanade Properties, LLC v. City of Seattle,* 307 F.3d 978, 985 (9th Cir. 2002) (quoting *Illinois Cent. R.R. v. Illinois,* 146 U.S. 387, 453 (1892)), *cert. pending,* No. 02-1304 (April 7, 2003, U.S.). Second, it permitted public trust considerations to obliterate any property development rights even when the state previously alienated the property in contemplation of development and development would not interfere with the public trust. *Id.,* 307 F.3d at 986. Third, it created an overly broad federal public trust doctrine that would validate expropriation without compensation of property long ago granted as private property subject to development. *Id.,* 307 F.3d at 986.

The Court of Appeals correctly considered the public trust doctrine constituted a "background principle" of Washington state law. *See Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1029 (1992).

Based on its erroneous conclusions about the application of the doctrine and its implications for federal constitutional protections for private property, however, the court determined that Esplanade was barred from recovering for a categorical regulatory taking when Seattle prevented it from developing its property. *Esplanade Properties*, 307 F.3d at 986–87. *See Lucas*, 505 U.S. at 1029. The first section of the argument considers the application of the public trust to Esplanade's property—the permissibility of alienating public trust property and the right to develop private property encumbered by the public trust. The third erroneous conclusion of the court below—its federalization of an overly broad public trust doctrine—is the subject of the final section of the argument.

The Court of Appeals relied principally on the public trust doctrine as a "background principle" of state law to deny relief to Esplanade for Seattle's regulatory prohibition on any development of its property. To explain its decision, the Ninth Circuit relied on precedents taken out of context to explain the public trust doctrine, which the court described as

> "reserv[ing] a public property interest, the *jus publicum*, in tidelands and the waters flowing over them, despite the sale of these lands into private ownership." "The state can no more convey or give away this *jus publicum* [aspect of the public trust doctrine] than it can 'abdicate its police powers in the administration of government and the preservation of the peace.' Instead, the state may only divest itself of interests in the state's waters in a manner that does not substantially impair the public interest.

307 F.3d at 985 (quoting *Illinois Cent. R.R. v. Illinois*, 146

U.S. 387, 453 (1892); *Weden v. San Juan County*, 958 P.2d 273, 283 (Wash. 1998); *Caminiti v. Boyle*, 732 P.2d 989, 994 (Wash. 1998)). The Court of Appeals' use of this general language threatens private property rights to public trust property alienated by the states free of the trust (including filled property once under water) as well as property alienated by the states subject to limited public trust restrictions.

A. *The Court of Appeals erroneously limited the ability of states to alienate public trust property.*

The Court of Appeals ignored the fact that the language it quoted provides only a general rule, to which several exceptions apply. For example, the key federal case that the Court of Appeals relies on discusses the circumstances under which a state may alienate property under water free of the public trust. *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 452 (1892). *Illinois Central* determined that the state legislature improperly granted several square miles of Lake Michigan lakebed to the Illinois Central Railroad in violation of the public trust. It explicitly approved smaller grants of public trust land to private parties where it was clear that the state legislature made a considered decision to alienate the property. 146 U.S. at 452. In fact, the leading Washington State case on public trust quotes *Illinois Central* for the proposition that the state can alienate public trust property in appropriate circumstances:

> "The control of the State for the purposes of the trust can never be lost, *except* as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining."

Caminiti v. Boyle, 732 P.2d 989, 994 (Wash. 1987) (quoting *Illinois Central,* 146 U.S. at 453) (emphasis added), *cert. denied,* 484 U.S. 1008 (1988). *Caminiti* determined that a statute granting tideland abutters the right to build docks without payment to the state did not violate the public trust. 732 P.2d at 997.

In this case, Esplanade's predecessor purchased the property from the state as first-class tidelands[2] in fee simple absolute in 1906 pursuant to a state policy encouraging development of such property. *See* Petition at 4 (describing 1906 state sale); *Davidson v. State,* 802 P.2d 1374, 1379 (Wash. 1991); *Harris v. Hylebos Indus.,* 505 P.2d 457, 461 (Wash. 1973); *Puget Mill Co. v. State,* 160 P. 310, 312 (Wash. 1916);[3] *State v. Sturtevant,* 135 P. 1035, 1040 (1913);[4] *Eisenbach v. Hatfield,* 26 P. 539, 543

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2 First-class tidelands are defined as:

> [T]he beds and shores of navigable tidal waters belonging to the state, lying within or in front of the corporate limits of any city, or within one mile thereof upon either side and between the line of ordinary high tide and the inner harbor line, and within two miles of the corporate limits on either side and between the line of ordinary high tide and the line of extreme low tide.

Wash. Rev. Code § 79.01.020.

3 Now it is no longer an open question in this state as to the nature of the title vested in grantees of second-class tide and shore lands [let alone in first-class tidelands more easily developable by state law] by deeds from the state absolute in form . . . . The decisions of this court lead to no other conclusion than that the state authorities have the power to, and when conveying lands of this nature by deeds absolute in form do, vest in the grantees an *absolute fee-simple title* to such lands.

Puget Mill Co., 160 P. at 312 (emphasis added).

4 The state has invited investment in these lands

(Wash. 1891) ("[T]he right of the state to grant the navigable waters, except as restrained by constitutional checks, is as absolute as its rights to grant the dry land which it owns . . . ."). *See also* Wash. Rev. Code § 47.12.020 (tidelands alienated by Washington State not imposed with public trust unless deed from state explicitly so provides).

The court below thus failed to consider both Washington State precedents recognizing and protecting private property rights in former public trust property, including alienated first-class tidelands, and the factual history of the actual property. *See Harris*, 505 P.2d at 461 (Wash. 1973); *Puget Mill Co.*, 160 P. at 312; *Sturtevant*, 135 P. at 1040; *Eisenbach*, 26 P. at 543. The opinion below did acknowledge, in a backhand manner, that under Washington law the state may dispose of public trust property if it does so "in a manner that does not substantially impair the publicinterest." *Esplanade Properties*, 307 F.3d at 985. *See Weden*, 958 P.2d at 283 (public trust alienation permitted if "the action promotes the overall interests of the public.") (quoting *Rettkowski v. Department of Ecology*, 858 P.2d 232, 239 (1993)).[5] The Court of Appeals, however, failed to deem this vital qualification of the public trust doctrine worthy to be addressed. Even the case most heavily relied on by the Court of Appeals[6] acknowledges that the state can alienate public trust property completely free of the trust.

> upon the theory that, in private ownership, all land lying back of the inner harbor line or the line of ordinary navigation would be reclaimed and put to useful purposes.

Sturtevant, 135 P. at 1040.

5 In *Rettkowski*, the court determined that the public trust was inapplicable. 858 P.2d at 239. Understandably, any *dictum* about the public trust was terse and without nuance.

6 *Esplanade Properties*, 307 F.3d at 986–87.

Orion Corp. v. State, 747 P.2d 1062, 1072 n.9 (Wash. 1987), *cert. denied,* 486 U.S. 1022 (1988). Nevertheless, without citation to the record or discussion of the treatment under Washington State law of first-class tidelands, the Court of Appeals categorically stated that "the public trust doctrine . . . unquestionably burdens Esplanade's property." *Id.,* 307 F.3d at 986.

The Appeals Court's blithe application of the public trust to property alienated by the state long ago is of significant concern to *Amicus.* New England contains significant amounts of state-alienated public trust lands. For example, most of downtown Providence is built on filled land. *Greater Providence Chamber of Commerce v. State,* 657 A.2d 1038, 1039–40, 1044 (R.I. 1995) (fill of public trust land with acquiescence or approvalof state establishes title free and clear of public trust). The Rhode Island legislature through explicit grants has also encouraged filling of public trust property for commercial wharves and docks in other areas. *See Providence & Worcester R.R. v. Pine,* 729 A.2d 202, 205–06, 208–09 (R.I. 1999) (statutory grant of public trust property for wharf facility in East Providence, passes free and clear of trust upon filling). Similarly, much of Boston is built on fill permitted pursuant to statute. *Manning v. New England Mut. Life,* 506 N.E.2d 870, 873 (Mass. 1987) (filled tidelands of Back Bay free from public trust); *Opinion of the Justices,* 424 N.E.2d 1092, 1099–1100 & n.3 (Mass. 1981) (statute could extinguish public trust in long-filled Boston tidelands and, provided grant is sufficiently clear, submerged land below mean low tide); *Opinion of the Justices,* 424 N.E.2d 1111, 1115–16 (Mass. 1981) (similar); *Boston Waterfront Dev. Corp. v. Commonwealth,* 393 N.E.2d 356, 361, 367 (Mass. 1979) (wharves filled in Boston Harbor below mean low tide constitute fee simple subject to condition subsequent that they be used for trust purpose); *Trio Algarvio, Inc. v.*

Department of Envtl. Protection, 778 N.E.2d 529, 531–32 (Mass. App. Ct. 2002) (wharfing statute on Acushnet River in New Bedford), *review granted*, 782 N.E.2d 1083 (Mass. 2003). *See New York, N.H. & H. R. Co. v. Armstrong*, 102 A. 791, 794 (Conn. 1918) (Connecticut could grant public trust property for a public use); *Opinion of the Justices*, 437 A.2d 597, 606–08 (Me. 1981) (statute to release state public trust claims to filled tidal and submerged land permissible; "[T]he clearing of title, so that commercial and other activity may go forward, is a legitimate and important public purpose."); *State v. Central Vermont Ry.*, 571 A.2d 1128, 1133 & n.5 (Vt. 1989) (Vermont legislature may grant public trust property in fee simple conditional requiring continued use compatible with trust, open question whether legislature can grant public trust property in fee simple absolute).

Despite this historic recognition by the courts of private rights in public trust and former public trust property, New England property owners remain concerned about protecting their property from over-vigilant state action. State legislatures and regulators have on a number of occasions attempted to curtail development of historically alienated public trust lands or to appropriate such lands for public use despite the fact that the state sold the property to the current owners' predecessors for development and use. *See Bell v. Town of Wells*, 557 A.2d 168, 177–78 (Me. 1989) (statute giving public access to private beaches unconstitutional); *Trio Algarvio, Inc.*, 778 N.E.2d at 534–35 (attempt to charge owner of wharf retroactive tidewater displacement and occupation fees for public trust property filled by predecessor pursuant to statutory grant); *Purdie v. Attorney General*, 732 A.2d 442, 447 (1999) (statute moving public trust boundary upland to highest high tide from mean high tide unconstitutional); *Opinion of the Justices*, 649 A.2d 604, 609–11 (N.H. 1994)

(similar); *Providence & Worcester R.R.*, 729 A.2d at 208–09 (regulatory attempt to limit statutory wharfing grant).

Strong federal court precedent providing remedies for regulatory takings of former public trust property and private property subject to limited public trust restrictions remain necessary to enforce property owners' expectations. The decision below, if allowed to stand, would effectively permit states to change their public trust doctrines retroactively to re-possess long ago alienated property without compensation and without allowing a federal remedy. *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 532 (1998) (O'Connor, J., plurality opinion) (retroactive application of novel legal doctrines discouraged).

B. The Court of Appeals erroneously determined that the existence of a public trust interest in state alienated property warranted the government's complete prohibition on use of the property.

In this case, the Court of Appeals determined that Esplanade's proposed houses might interfere with recreation at a park near the property (a novel public trust use).[7] The court therefore determined that Seattle's

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7 The *Orion Corp.* opinion heavily relied upon by the Court of Appeals recognized the novelty of recreational use as a ground for exerting the public trust, in light of the traditional grounds of navigation and fishing. *Orion Corp.*, 747 P.2d at 1073 & n.10. *See* Lloyd R. Cohen, *The Public Trust Doctrine: An Economic Perspective*, 29 CAL. W. L. REV. 239, 240 (1992); James L. Huffman, *Trusting the Public Trust to Judges: A Comment on the Public Trust Writings of Professors Sax, Wilkinson, Dunning and Johnson*, 63 DENV. U. L. REV. 565, 571–72 (1986); James L. Huffman, *Avoiding the Takings Clause Through the Myth of Public Rights: The Public Trust and Reserved Rights Doctrines at Work*, 3 J. LAND USE & ENVTL. L. 171, 190–91, 211 (1987); Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust*

prohibition of any use of Esplanade's property was consistent with the public trust, even though Washington State had previously alienated the property for development purposes and Seattle had zoned the property residential:

> [B]ecause Esplanade's tideland property is navigable for the purpose of public recreation (and for fishing and general recreation . . .) and located just 700 feet from Discovery Park, the development would have interfered with those uses, and this would have been inconsistent with the public trust doctrine. Therefore, Esplanade's development plans never constituted a legally permissible use.

Esplanade Properties, 307 F.3d at 987.

Even if the public trust applied to Esplanade's property, the mere recitation of the doctrine is insufficient to justify denial of any possible use of the property. The case most heavily relied on by the Court of Appeals in fact acknowledged that, when the state alienates property subject to the public trust, the government must permit the property owner some economically viable trust-compatible use of the property. *Orion Corp.*, 747 P.2d at 1073.[8] In this case, Seattle

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Doctrine, 71 IOWA L. REV. 631, 632, 642–43, 710–11 (1986); Geoffrey R. Scott, *The Expanding Public Trust Doctrine: A Warning to Environmentalists and Policy Makers*, 10 FORDHAM ENVTL. L.J. 1 (1998).

8 The state argues that the public trust doctrine precludes [the property owner's] takings claim *in its entirety*. The validity of the State's argument depends on whether [the owner's] property, burdened by the trust, is functionally and economically adaptable to some present, possible, and reasonably profitable use. . . . [W]e cannot determine whether [the] property is adaptable to any

prohibited all viable use of Esplanade's property without proposing any reasonable trust-compatible use for the property. This constitutes a perversion of the public trust doctrine into an anti-growth tool, when its historical intent was to maximize efficient *use* of a significant resource. *See* Lloyd R. Cohen, *The Public Trust Doctrine: An Economic Perspective,* 29 CAL. W. L. REV. 239, 254 (1992). *See* Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine,* 71 IOWA L. REV. 631, 647 (1986). Thus, if the Court of Appeals decision in this case remains in effect, it could portend an end to federal court protection of property rights in property now or previously covered by the public trust, including a great deal of property in the New England states.

II. The Court of Appeals' use of federal public trust precedents demonstrates the extent of the federal issue in this case.

The Court of Appeals in this case relied on its overbroad interpretation of the public trust doctrine to eliminate the value of property long held in private hands. The Court of Appeals' decision is significant not only because state courts often follow federal interpretation of the public trust doctrine, but also, more significantly, because it signals a federal interpretation of the public trust doctrine that disclaims Fifth Amendment takings clause protection for thousands of acres of property worth billions of dollars

While the public trust doctrine is unique in each state, *Shively v. Bowlby,* 152 U.S. 1, 26 (1894), the broad

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> use that does not impair the public trust. As a result we have remanded for a further factual determination.

Orion Corp., 747 P.2d at 1073 (citation omitted) (emphasis added).

outlines of the doctrine are similar in all the states. *Id.* The federal courts therefore act as the guardians under the Fifth and Fourteenth Amendments of private property subject to state-sanctioned deprivations made in the name of the public trust doctrine or other background principles of state law. *Palazzolo v. Rhode Island,* 533 U.S. 606, 617 (2001). State and federal courts in New England and throughout the United States follow federal public trust jurisprudence in defining the outer limits to which their state public trust doctrines can go without impairing private property rights. *See The Golden Rod,* 197 F. 830, 834 (D. Me. 1912) (citing *Illinois Central*), *aff'd,* 208 F. 24 (1st Cir. 1913); *New York, N.H. & H. R. Co.,* 102 A. at 794 (citing *Shively* and *Illinois Central*); *Opinion of the Justices,* 437 A.2d at 605, 607 (Me. 1981) (citing *Shively* and *Illinois Central*); *Opinion of the Justices,* 424 N.E.2d at 1099 n.3, 1106 (Mass. 1981) (citing *Illinois Central*); *Boston Waterfront Dev. Corp.,* 393 N.E.2d at 360, 355–56 (citing *Shively,* quoting *Illinois Central*); *Home for Aged Women v. Commonwealth,* 89 N.E. 124, 127–28 (Mass. 1909) (citing *Shively* and *Illinois Central*); *Opinion of the Justices,* 649 A.2d at 607 (N.H. 1994) (quoting *Shively*); *Greater Providence Chamber of Commerce,* 657 A.2d at 1042–43 (quoting *Shively,* citing *Illinois Central*); *Central Vermont Ry.,* 571 A.2d at 1132 (quoting *Illinois Central*).

If the decision below stands, states will be able to change their historic interpretations of the public trust and deprive property owners of property granted to them or their predecessors with the expectation of development. The need for federal protection of property rights previously affected by the public trust is by no means remote. Advocates have for over thirty years, with some success, urged the expansion of the public trust doctrine beyond its traditional confines to encourage open space and discourage property development. *See*

Cohen, 29 CAL. W. L. REV. at 240 ("[T]he public trust doctrine that is, particularly the post-1970 American case law and commentary, bears only a tangential relation to its antecedents; it is far less clear as to content, radically changed in focus, and enormously enlarged in scope . . . ."). *See also supra* note 7 (articles detailing courts' recent expansion of public trust doctrine from protection of commerce to protection of environment).

In fact, the originator of the expansive modern public trust doctrine acknowledges that his theories attempt to expand the doctrine beyond its common law roots. *See* Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 485 (1970). Ironically, "[t]he communal interests sought to be protected by the English public trust doctrine were commercial rather than environmental; it was fishing and navigation that were favored rather than recreational, aesthetic, or symbolic pursuits." Cohen, 29 CAL. W. L. REV. at 254. *See* Lazarus, 71 IOWA L. REV. at 647. The use of the public trust to prevent all property development, as in this case, is thus a novel and unprecedented expansion of state public trust law applied by a federal court purportedly protecting property rights against undue encroachments by state regulators. *See Harris*, 505 P.2d at 776 ("The notion that all tidelands must be left in their natural state is incompatible with the legislative intent on this matter, as it has been expressed in statutes since the inauguration of statehood.").

Expanding the public trust beyond its historical roots in this manner is contrary to the expectations of thousands of owners of littoral and riparian properties and properties long ago alienated (and oftentimes filled) for development at the encouragement of the state. *See Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

This Court disfavors retroactive application of such a novel legal doctrine. *See Eastern Enterprise,* 524 U.S. at 532 (O'Connor, J., plurality opinion). Background principles of state law, for purposes of regulatory takings analysis, should constitute "common, shared understandings of permissible limitations derived from a State's legal tradition," not novel developments. *Palazzolo v. Rhode Island,* 533 U.S. at 630. Background principles cannot be "newly decreed." *Lucas,* 505 U.S. at 1029. Thus, Seattle cannot, in the name of the Washington State public trust, burden Esplanade's property development rights granted by Washington State with novel legal constructs. The Court of Appeals in this case has abdicated its federal role in protecting state-created property rights.

This case thus raises a matter of national concern that this Court has not previously considered: the extent to which federal courts will enforce owners' rights to property once or currently under water when the government granted it to them free of the public trust or subject to limited public trust protections. This Court should therefore grant *certiorari* in this case pursuant to Supreme Court Rule 10 (b) because the decision below conflicts with decisions in other jurisdictions and pursuant to Rule 10 (c) because it raises an important question of federal law.

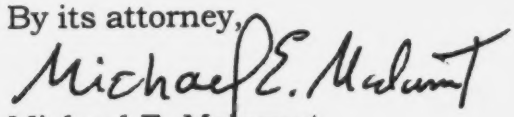
CONCLUSION

For the reasons stated above, this Court should grant Esplanade's petition for a writ of *certiorari*.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION,

By its attorney,



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